Tenaga Nasional Bhd v AWP Enterprise (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–772 OF 2011
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
4 NOVEMBER 2014

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Public Utilities — Electricity — Consumption and usage — Allegation of tampering of meter — Claim for loss of revenue — Whether tampering proved — Documentary evidence — Admissibility of computer printout — Failure to call maker of document as witness — Whether invoked adverse inference under s 114(g) of the Evidence Act 1950

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The present claim arose from an inspection of the meter at the respondent's premises which was alleged to have been tampered with. The meter was discovered to have failed to record the correct usage of electricity. After repairing the meter, the appellant found out that the usage amounting to RM443,598.77 between 1 September 2006–15 May 2008 was not recorded. The respondent failed to settle the amount and the appellant commenced an action for the recovery of the amount due. The High Court dismissed the claim and hence, the present appeal. The issues that arose were, inter alia, whether the documentary evidence in the form of a computer print out ('exh P2') was admissible as evidence; and whether tampering had been established.

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Held, allowing the appeal with cost of RM30,000:

(1) PW2's testimony explained lucidly how the estimates were arrived at. He was clearly a person with the necessary knowledge of how the estimates were calculated. Whether the data in the computer was correct was another matter. It was possible that data had not been correctly read and collected, or that the data had been wrongly keyed in (see para 22).

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(2) The evidence before the court failed to show that the estimate was manifestly unreasonable, excessive or wrong and that the High Court should have found that the estimate had successfully been proven upon a balance of probabilities. If it was established that a meter had been tampered with and its readings did not reflect the actual consumption of electricity, and the additional charge or back charge imposed upon the consumer was not demonstrated to be manifestly unreasonable, excessive or wrong, the amount due was proved upon a balance of probabilities (see paras 24 & 31–32).

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[Bahasa Malaysia summary

Tuntutan ini berbangkit daripada pemeriksaan meter di premis responden yang didakwa telah diusik. Meter didapati gagal untuk merekodkan penggunaan betul elektrik. Selepas membaiki meter, perayu mendapati bahawa penggunaan berjumlah kepada RM443,598.77 di antara 1 September 2006–15 May 2008 tidak direkodkan. Responden gagal untk menyelesaikan jumlah dan perayu memulakan tindakan untuk mendapatkan semula jumlah yang kena dibayar. Mahkamah Tinggi menolak tuntutan dan maka, rayuan ini. Isu yang berbangkit adalah, antara lain, sama ada keterangan dokumentar dalam bentuk cetakan komputer ('lampiran P2') adalah boleh diterima sebagai keterangan; dan sama ada usikan telah dibuktikan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000:

(1) Keterangan PW2 menjelaskan dengan jelas bagaimana anggaran dicapai. Dia jelas seorang yang mempunyai pengetahuan yang perlu bagaimana anggaran dikira. Sama ada data di dalam komputer adalah betul adalah perkara lain. Adalah mungkin bahawa data tidak dibaca dan dikutip secara betul, atau data telah salah dimasukkan (lihat perenggan 22).

(2) Keterangan di hadapan mahkamah gagal untuk menunjukkan bahawa anggaran adalah jelas tidak munasabah, berlebihan atau salah dan bahawa Mahkamah Tinggi patut mendapati bahawa anggaran telah berjaya dibuktikan atas imbangan kebarangkalian. Jika ia dibuktikan bahawa meter telah diusik dan bacaannya tidak membayangkan penggunaan sebenar elektrik, dan caj tambahan atau caj kebelakangan yang dikenakan ke atas pelanggan tidak ditunjukkan sebagai jelas munasabah, berlebihan atau salah, jumlah yang perlu dibayar dibuktikan atas imbangan kebarangkalian (lihat perenggan 24 & 31–32).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
ALF Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [2005] 5 MLJ 717; [2005] 3 CLJ 936, CA (refd)
I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208; [1975] 1 LNS 61, FC (refd)
Malayan Banking Bhd v Dr Betharajoo a/l Krishnasamy [2000] 3 MLJ 391; [2000] 3 CLJ 141, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Legislation referred to

Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38, 38(3), (4), (5), 53, Part IX
Evidence Act 1950 s 90A
Licensee Supply Regulations 1990 reg 11, 11(2)

Appeal from: Civil Suit No D-22–1050 of 2009 (High Court, Kuala Lumpur)

Steven Thiru (David Mathew and Ashmadi bin Othman with him) (Che Mokhtar & Ling) for the appellant.
HY Loo (Isabella ak Nyomek with him) (JM Chong, Vincent Chee & Co) for the respondent.

Abdul Wahab Patail JCA:

[1] On 21 February 2011, the High Court dismissed the claim by the plaintiff Tenaga Nasional Bhd ('the appellant') against the defendant AWP Enterprise (M) Sdn Bhd ('the respondent').

[2] The respondent is the registered user of the account 0-12100512670 for the supply of electricity to its premises at Lot 9672, Jalan Desa Aman 13, Batu 11, Jalan Kuala Selangor, 47000 Desa Aman Sungai Buloh, Selangor Darul Ehsan.

[3] Having heard the parties, this court allowed the appeal, entered judgment for the appellant in terms of the prayers (a) and (b) at para 16 of its statement of claim with costs fixed at RM30,000 here and below.

BRIEF FACTS

[4] The appellant's claim arose out of the discovery upon an inspection conducted at 11.10pm on 15 May 2008 that the meter had been tampered with. The inspection was conducted in the presence of the respondent. It was found that as a result of the tampering, the meter failed to record the correct usage of electricity. The meter was repaired by the appellant, who lodged a police report DESA JAYA/00317 8/08 on 16 May 2008. It was calculated that for the period from 1 September 2006–15 May 2008, usage amounting to RM443,598.77 was not recorded. The respondent failed to settle this amount and litigation was commenced to recover:

(a) the sum of RM443,598.77;

(b) interest thereon at 8%pa from the date of judgment to date of full settlement; and

(c) costs.

A THE DEFENCE

[5] The defence in the statement of defence was:

(a) the respondent was not given notice of the intended inspection;

B (b) on the night of 15 May 2008, some TNB officers, claiming to have a police warrant, forced their way into the factory, cut the padlock to the room in which the TNB metering installation is located;

(c) the respondent was not given notice of their findings;

C (d) the respondent was told that the TNB metering installation was tampered, by a letter dated 21 October 2008;

(e) the notice did not give the particulars of tampering as asserted at para 7 of the statement of claim:

D (i) the sticker at the back of the connection box was tampered with or cut and a fake seal was used on the connection box behind the switchgear;

E (ii) the circuit S1 and S2 for the red, yellow and blue power supply was intercepted with a wire; and

(iii) the electricity meter that had been installed was not recording the actual usage of the electricity by the consumer,

F (f) at all times, the meter was read by the TNB meter reader every month and the respondent had paid the amounts in the billings; and

(g) the respondent denied liability for the amount claimed on the grounds that the increase amounted to 27%, whereas the bills before and after the inspection were roughly the same, and put the appellant to strict proof.

G THE ISSUES FOR TRIAL

[6] The issues for trial were listed as follows:

H (a) Samada Plaintif perlu memenuhi peruntukan undang-undang untuk mengisukan apa-apa Notis memberitahu tentang pemeriksaan ke atas meter Plaintif di premis Defendan.

(b) Samada ada atau tidak Defendan telah melakukan pengusikan pada pepasangan meter/meter Plaintif.

I (c) Samada ada berlaku atau tidak kejanggalan kepada pepasangan meter/meter Plaintif.

(d) Samada Plaintif telah bertindak menurut Akta Bekalan Elektrik 1990.

(e) Jika benar berlaku kejanggalan kepada pepasangan meter/meter Plaintif, samada Defendan berhutang atau tidak wang berjumlah RM443,598.77 kepada Plaintif.

(f) Samada Plaintif perlu memenuhi dan mengikut peruntukan di 'Licensee Supply Regulations 1990'.

SUBMISSIONS AT TRIAL

[7] We reproduce the issues pursued in submissions for the respondent in the High Court:

(9.1) Tindakan Defendan pada masa yang material selepas pemeriksaan pada 15.5.2008 adalah tidak konsisten dan tidak munasabah;

(9.2) Defendan telah membayar bil bulanan seperti yang ditetap oleh Plaintiff;

(9.3) Penggunaan bekalan oleh Defendan selepas pembetulan pepasangan meter adalah lebih kurang sama seperti sebelum pembetulan dilakukan;

(9.4) Plaintif gagal memperuntuk bukti yang mencukupi tentang bagaimana 'back billing' dilakukan;

(9.5) Tuntutan Plaintif adalah melanggari peruntukan di bawah 'Licensee Supply Regulations 1990';

(9.6) Keterangan dokumen Plaintif yang tidak patut diterima atas bantahan teknikal.

FINDINGS OF THE HIGH COURT

[8] In its grounds of judgment, the High Court summed up the appellant's claim, the respondent's defence, the appellant's case and witnesses' testimony, the respondent's case and witnesses before proceeding to its finding and analysis on the issue of tampering, whether the tampering was carried out by the respondent, burden on the respondent as the defendant on facts asserted in support of the defence, absence of notice for the intended inspection, the relationship between the respondent and Bright Rims, that all monthly bills issued had been settled by the defendant, whether the appellant had proved the quantum of its loss, findings and analysis on the issue of quantum, issues of law on the Electricity Supply Act 1990 ('Act 447') and the Licensee Supply Regulations 1990 ('PU(A) 384/1990'), the effect of reg 11(2) of PU(A) 384/1990, and holding that reg 11(2) limits claims for back charges 1–3 months from the date of the service of notice to the consumer of such undercharges, that s 38(3) of Act 447 applies only where that consumer has been charged and convicted of any such offence under sub-s 37(1), (3) or (14). The High Court dismissed the appellant's claim with costs of RM25,000.

THE APPEAL BEFORE THIS COURT

[9] Eleven grounds were set-out in the memorandum of appeal and addressed in the written submissions for the appellant. For the respondent, the submissions were presented as follows:

(a) introduction;

(b) background;

(c) principles of law as to appeals;

(d) the grounds of appeal;

(e) whether P2 is admissible as evidence;

(f) whether the claim was proved; and

(g) regulation 11(2) of the Licensee Supply Regulations 1990.

CONSIDERATION AND CONCLUSIONS

[10] It was submitted by the respondent that in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, a decision of the Court of Appeal, it was held:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. ...

[11] We observe the quotation is incomplete. The Court of Appeal in fact held:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[12] The reason for reluctance by an appellate court to intervene with the findings of a trial court is that the parties had the opportunity to analyse pleadings as to what facts are relied upon, of those facts what are and what are not disputed. Where facts are disputed but the disputing party did not utilise the process of interrogatories and discovery to check and verify the facts, it must be concluded that the dispute was a bare dispute or denial, and it is unfair and unjust to allow a second bite of the cherry. Indeed, only when in respect of a disputed fact in a trial court a dispute remains after the evidence relied upon has been checked and verified by the parties, does it warrant the time of the trial

court to hear, and evaluate the evidence, and to consider the submissions thereon. But where on the spur of the moment, off the cuff or impromptu questions are asked without prior checking is objected to, the trial court is entitled to disallow the questioning on the grounds that it is unsafe and unfair to rely upon the answers as the other party had not had the opportunity to check and verify it. The objective of trial remains always to get the facts right by giving parties the opportunity to check and verify every dispute. A trial is not a refereeing of a contest of words to be won by *argumentum ad hominems* and surprises. Decisions in such cases cannot be described as judicial.

[13] The trial court, a court of first instance, has the advantage over an appellate court in the assessment of the relative credibility of oral evidence, in other words, of the witnesses who testified and were tested on their testimony before the trial court. The trial court is said to have an audio visual advantage in respect of the assessment of oral evidence or testimony to determine whether it is safe to rely upon the evidence of one witness rather than another witness or other evidence. But that advantage is an advantage only if it is prevailed upon, in other words if facts from audio or visual observations of the judge are set-out in the grounds of decision as reasons for accepting the evidence of one witness rather than other evidence or witness. If no such reasons are set-out, it means the trial court did not rely upon the audio visual advantage, but merely made evaluation of the content of his testimony against other evidence. In such a case, the appellate court is in the same position as the trial court.

[14] Scrutiny of the grounds of judgment offered no excuse to hold intervention is not possible because of any audio visual advantage depended upon by the trial judge.

[15] This case concerned electricity supply. We bear in mind:

(a) electricity is unlike fuel oils supplied in fixed quantities according to order, such that the quantity bought and supplied is clearly determined by delivery orders and invoices;

(b) other than the cables and switchgear by which it is supplied, it is invisible;

(c) the bottom line remains that a consumer pays, in common language, for the quantity of electricity consumed;

(d) that quantity is determined by a meter, installed necessarily in the premises of the consumer;

(e) if the meter is tampered with, the recording would not reflect the actual quantity of electricity consumed; and

(f) even if the meter is placed in a room that is kept locked, someone may still access it or intercept the electricity cables before reaching and thereby bypassing the meter.

[16] The High Court did not err in applying common sense to hold that notice before an inspection makes the inspection an act of futility. Further, once tampering is established, the party who did so is, upon a balance of probabilities, the consumer who pays the electricity bill. Who else would gain by doing so? The arguments as to who actually used the electricity, and the giving of notice before an inspection, are arguments with no merit, and probably only to lead the trial astray from focusing on the relevant issues. Likewise, the argument that electricity bills had been regularly paid as billed every month. What difference does that make as the meter reader merely read what the meter shows. It does not preclude that the meter was not recording actual consumption. The germane question is how to determine the amount of electricity consumed when a meter has been tampered not to read it or to read it correctly.

[17] For the electricity supplier, it is impossible to turn back the clock and re-meter the consumption. The determination is necessarily by an estimate.

[18] It was held by the High Court, relying upon *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 and *Malayan Banking Bhd v Dr Betharajoo a/l Krishnasamy* [2000] 3 MLJ 391; [2000] 3 CLJ 141, that the appellant should have either called the officer who had keyed in the data to testify or to produce a certificate under s 90A of the Evidence Act 1950 from an officer of the appellant who is responsible for the management of the computer that these documents were prepared from the plaintiff's computer in the course of its ordinary use.

[19] Section 90A of the Evidence Act 1950 ('Act 56') provides admissibility of documents produced by computers, and of statements contained therein:

90A

(1.) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2.) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3.) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4.) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5.) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6.) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7.) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was —

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[20] There was no certificate under s 90A and therefore the appellant could not prevail upon the provisions relating to the weight that can be attached to the document.

[21] The High Court considered the evidence of PW2:

> It is also clear from PW2's evidence that the analysis of the original and corrected graphs were done by an engineer of the plaintiff and PW2 was not involved in the analysis.
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> PW2 also testified that the corrected graphs were not produced from the meter or any machine but based on an analysis of the computer data at the plaintiff's computer.
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> PW2 also confirmed that the documents in exh P2, which are computer generated documents, do not show the actual calculations of the back charges but only a summary of the calculation.
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> PW2 also admitted that the corrected graphs are based on estimated usages and not the actual usages of electricity.
>
> PW2 further confirmed that the actual calculations of the back billing are found in the plaintiff's computer and these calculations are not before the court.
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> It is obvious that PW2 was not the right person to produce exh P2 as he was not the maker of the said document and his evidence on the calculations of the back charges prepared by an engineer who was not called to testify was mere oral hearsay and exh P2 a documentary hearsay.

[22] On perusal, we find that PW2's testimony explained lucidly how the estimates were arrived at. He was clearly a person with the necessary knowledge of how the estimates are calculated. Whether the data in the computer is correct is another matter. It is possible that data had not been correctly read and collected, or that the data had been wrongly keyed in.

[23] The relevance of the reasoning that the person who keyed in the data should have been called must be tested against the purpose for which the person is to be called. Essentially calling a witness to testify is to give the respondent an opportunity, in this case, to put the question whether the witness keyed in the data correctly. If such witness admitted the possibility of errors in keying in the data, it does not address the accuracy of the data in the first place. In our view, the failure to call as witness the person who keyed in the data should not attract adverse inferences. While the law permits the drawing of adverse inferences from certain failures, whether or not a particular adverse inference is drawn must necessarily be drawn from the nature, relevance and the surrounding circumstances, and not solely from the failure alone.

[24] The germane consideration, in our view, is that the document demonstrates how an estimate is arrived at in calculating back charges to be imposed. An estimate, compared to actual evidence will appear as sketchy, hazy and confusing. Statistical mathematics and analysis is not a subject within the expertise of lawyers and judges. If the estimate results in imposing an additional charge of 27% to what had been billed and paid, it is not so necessarily beyond

the bounds of reasonability that it must be rejected. In our view, if it is established that a meter had been tampered with and its readings does not reflect the actual consumption of electricity, and the additional charge or back charge imposed upon the consumer is not demonstrated to be manifestly unreasonable, excessive or wrong, the amount due is proved upon a balance of probabilities.

[25] In the final analysis:

(a) a consumer must pay for the electricity he consumes;

(b) he should not be allowed to benefit from tampering of meters to pay less, as it results in the general public paying more for their electricity; and

(c) since the clock cannot be turned back to re-measure the consumption, only estimates can be made, and if such estimate is not shown to be manifestly unreasonable, excessive or wrong, it may be accepted as proof upon a balance of probabilities of the amount estimated and claimed.

[26] In *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208; [1975] 1 LNS 61 (FC), Raja Azlan FJ (as His Majesty then was) had occasion to say:

> I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous. Whether the appellant company was carrying on business of trafficking in immovable property must, in the last analysis, depend on all the surrounding circumstances, so that no single criterion can be formulated.

[27] This was referred to by the Court of Appeal in *ALF Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 5 MLJ 717; [2005] 3 CLJ 936 (CA).

[28] Likewise, excessive demands on technicality and specific evidence as proof overlooks other relevant facts and evidence. That it results in benefiting the wrongdoer is a greater inequity and injustice than the wrongdoer having to pay a back charge upon an estimate that is not shown to be manifestly unreasonable, excessive or wrong.

[29] The appellant, upon whom the burden of proof lay to prove its case upon a balance of probabilities, having adduced evidence of the estimate and how it is arrived at, the burden shifts to the respondent to show that the estimate is in fact manifestly unreasonable, excessive or wrong.

[30] That the electricity bills subsequent to the repairs having been effected after the tampering was discovered, are 'roughly the same', is on the face of it a relevant consideration, but only so provided it is established the actual consumption of electricity remained the same. This is because reduced consumption, such as by monitoring wastage or improved and more efficient equipment, or reduced production due to adverse markets, would also keep the post tamper-repair electricity bills down.

[31] The party in whose hands is the evidence from which actual usage may be derived is the consumer. Equipment used and their wattage specifications are in the hands of the consumer. The hours of use may be recorded, or may be estimated by correlation with the product and quantities produced, or the man-hours used to determine wages and allowances for workers. These are evidence in the respondent's records. We find the evidence before the court lacking in showing that the estimate of 27%, totalling RM443,598.77 for about 19 1/2 months (or about RM22,750 per month) was manifestly unreasonable, excessive or wrong.

[32] We, therefore, hold that the High Court should have held that the claimed amount of RM443,598.77 as an estimate that is not manifestly unreasonable, excessive or wrong has been successfully proved upon a balance of probabilities.

[33] We turn to the question of law.

[34] It arises from ss 37 and 38 of Act 447, and reg 11(2) of PU(A) 384/1990. The question is whether taking into consideration reg 11(2), a conviction under s 37 for tampering is a necessary precondition to a claim made under s 38(4) of Act 447.

[35] Part IX of Act 447 provides for offences by consumers as well as licensees and other persons and their employees or servants, and the penalties therefor. The following offences were, inter alia, created under s 37 as follows:

> (1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for

each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

...

(3) Any person who in any manner dishonestly —

(a) abstracts electricity;

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

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...

(14) Any person who damages any meter or other instrument used on or in connection with any licensed installation, for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

...

[36] Section 38 of Act 447 provides:

(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorized by the supply authority or the licensee shall immediately

A disconnect or cause the supply of electricity to be disconnected from those premises.

(2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection.

B Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

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(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of

D electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

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(b) the person liable for the payment thereof,

shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

F (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[37] On the face of it, it is capable of two interpretations:

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(a) the location of s 38(3) in Part IX of Act 447, and the use of the words '... may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including ...' therein appear to be strong arguments that there must first be a conviction; or

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(b) the fact that the section did not specifically use the words 'convicted of an offence ...' require proof of tampering but upon proof on a balance of probabilities and not beyond reasonable doubt.

I **[38]** The first literal interpretation results in an apparent absurdity that the licensee is denied the right to claim for the loss unless there is a conviction by a third party, the prosecutor, and a consumer who tampered with the meter is not obliged to pay if it is not convicted of an offence. Such a literal interpretation not only alters the standard of proof to recover outstanding

payments due from upon a balance of probabilities to proof beyond reasonable doubt, but also upon the proving of the case by a third party, the prosecutor.

[39] The inequity and injustice from such a literal interpretation is also evident from a slightly different angle. It may be said that the remedy to losses from tampering is to eliminate tampering itself. To eliminate tampering altogether is, however, well nigh impossible. It arises from the honesty or lack thereof of the consumer in whose premises the meter is necessarily located to record his consumption of electricity.

[40] The alternative is steps to minimise such offences. To minimise tampering, for example, with monthly inspections, would increase the costs that will only be passed on to consumers. Is it fair that consumers be effectively penalised by having to pay higher costs because of the acts of those who try to benefit by tampering with the meters. Are they also to be doubly rewarded by limiting claims for back charges only to when they are successfully convicted, ie the case against them is proved beyond reasonable doubt, when the burden of proof in a civil claim is upon a balance of probabilities? Who has ever heard of a third party entering a consumer's premises, and tamper with the meter to the benefit of the consumer? It cannot be overlooked that the meter is located in the consumer's premises to record electricity consumption in the premises. Is it rightly suggested that he need not pay for what he had consumed on the argument that through no fault of his, the amount consumed could not be metered?

[41] The question follows: Should the court apply an interpretation that makes parliament look incompetent, and makes the courts appear to be dancing with those who benefit from tampering? The second interpretation would not interfere with the licensee's rights to seek and recover payments for electricity supplied and consumed.

[42] Furthermore, it is trite that statutory interpretation is to give effect to the statute according to the intent of parliament. An absurdity cannot be the intent of parliament. Hence, if a literal interpretation results in an absurdity, then an interpretation is applied so that it enables the intent to be realised. Such an interpretation has been termed a purposive interpretation. Regardless of whether the interpretation is 'literal' and 'purposive', the objective is to give effect to the statute according to the intent of parliament without any absurdity.

[43] On the most basic level, a licensee does not require s 38(4) for a cause of action against a consumer for losses suffered from tampering of the electricity meter recording the consumer's consumption of electricity. We bear in mind that the licensee has neither authority to prosecute nor control over

prosecutions for offences under s 37. All that s 38(4) does therefore is to enable the licensee to rely on a conviction, if any, obtained by the prosecutor, and as provided by s 38(5), to rely upon the written statement under s 38(4) as prima facie evidence of the loss of revenue suffered and the consumer liable for the payment thereof.

[44] The reg 11 of PU(A) 384/1990, made under s 53 of Act 447, provides:

> (1) The licensee shall provide and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.
>
> (2) The reading of the consumer's meter shall be prima facie evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:
>
> (a) meter inaccuracy;
>
> (b) malfunctioning of the meter or its associated installation or part thereof;
>
> (c) incorrect meter reading;
>
> (d) incorrect application of a meter multiplying constant;
>
> (e) cross-connection of installation to different accounts; or
>
> (f) faulty installation,
>
> the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation: Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.
>
> ...
>
> ...

[45] The effect of reg 11(2) is to extend a similar power to make adjustments to the payments due arising from undercharging or overcharging as a result of meter inaccuracy, malfunctioning of the meter or its associated installation or part thereof, incorrect meter reading; incorrect application of a meter multiplying constant, cross-connection of installation to different accounts or faulty installation.

[46] For the foregoing reasons, we allowed the appeal and made the orders set out in para 3 above.

Appeal allowed with costs of RM30,000.

Reported by Afiq Mohamad Noor